# THE PORT FOLIO,

(NEW SERIES)

BY OLIVER OLDSCHOOL, ESQ.


Various;—that the mind
Of desultory man, studious of change,
And pleas'd with novelty, may be indulg'd.
COWPER.


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## ORIGINAL PAPERS.

*For the Port Folio.*

### THE DAY.

BY DAVID DIARY.

No. 19.

Et tu, Brute?—

MR. DIARY,

MY thanks too are due to Sulpicius. He has placed himself in the very situation of which I warned every lover of his country and every friend of public freedom to beware, and condescended to close with me upon my own ground. I am gratified, at once with the field on which I am to fight, and with the high respectability of my adversary.

Sulpicius honours me with his cordial approbation of the principal part of my first letter; and he honours me still further, by yielding me the very valuable assistance of his eloquence and acumen, in the cause of which I have there stood up the advocate. His deprecation of the doctrine, that the public servants are not bound to criminate one another, is not only just, but, strangely as the word may sound, well-timed. I have only to wish, that it had been dictated by his knowledge, his judgment and his sentiments, to brand still more distinctly, with the full strength of his pen, the unconstitutional character of the plea of the *special signification*, and the equally unconstitutional conduct of the judge, in not having trampled it under his feet.

But, Sulpicius submits to me, Whether, in my last letter, I have not gone too far, in asserting, That the conduct of the public servants, whatever it might have been, could afford no answer to the indictments preferred against Smith and Ogden?—I think that I have not; that I have not, it was the single object of that letter to show; and, that I have not, I will, in the present, still further attempt to show; rejoicing, as I do, at the very simple form, under which, through the good sense of Sulpicius, I am free to pursue the inquiry.

In the letter referred to, I have said, that in right reasoning, the only argument must be, from the competence to allow, to the defence founded on the allowance. It is here that Sulpicius fairly meets me; he struggles for this competence to allow; he declares, that the defendants had *no other defence*, and that a *better one could not be desired.*

Sulpicius is a bolder champion of messieurs Ogden and Smith than any with whom it has before been my fortune to meet; and, in the same proportion, he is, according to my ideas, a more determined besieger of the public rights. Others are willing to justify those gentlemen, by transferring their imputed guilt to the shoulders of Mr. Jefferson; a deplorable contempt, as I have argued, of the common rules of justice;—but, Sulpicius is not afraid to rest that justification upon principles, as I assert, and shall endeavour to make appear, inconsistent, not only with that constitution

to which he appeals, but with every other constitution, or form of government, not avowedly despotic.

Others, I repeat, deduce the innocence of messieurs Ogden and Smith from the guilt of the public servants; but Sulpicius founds it on what he supposes to be the constitutional prerogative of the President. He allows the guilt to be a monstrous plea, and so far we are agreed; Sulpicius and myself, therefore, are unembarrassed by any points of discussion to which this view of the case might give birth; our sole subject of controversy is this, that either the President has or has not the prerogative which is bestowed upon him by Sulpicius. If, therefore, I can show that he has not, Sulpicius will immediately allow me, that no defence derived from it could avail the defendants in question. *Nemo dat qui non habet.*

Nor is this all. If my first exception should fail me, I have a second to take. I am prepared to say, to Sulpicius, Either the President has this prerogative or he has it not; and, in either case, the situation of those defendants was neither worse nor better. The question could not bear upon them at all.

When Sulpicius refers to the constitution of the United States, he refers rather to what it is possible he may think it ought to be, than to what it is. I, on the contrary, have nothing to do with what it ought to be; I look only to what it is.

If I am able, and I think it is not very difficult, to discover the spirit and meaning of the American constitution, it has for its first object, its second and its third, to render the President, not a sovereign, but a minister. In every form of government, the sovereignty must be placed somewhere: in the American, it is placed in the Congress. The members of Congress are as much the co-sovereigns of the country, as have been the directors and consuls of France, or the nobles of Venice: the President is their first minister. The constitution of the United States has distinctly recognized this sovereignty, by giving it limitations. Let us compare some of the prerogatives of the king of Great Britain, with those granted by the constitution to Congress.—He may erect courts of law; he may appoint the judges; he may establish public marts; he may regulate weights and measures; he may coin and ascertain the value of money; he may collect and disburse the public revenue; he may appoint all officers, military and naval; he may send and receive ambassadors; he may make treaties; he may declare war; he may grant letters of marque and reprisal; and he may open and establish ports and havens. Let us hear almost an echo of all this, in the terms of The Constitution of the United States of America, Article I. sect. 8.—The *Congress* shall have power To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States; (but all imposts and excises shall be uniform throughout the United States;) to borrow money on the credit of the United States; to regulate commerce with foreign nations and among the several states and with the Indian tribes; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States; to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish post-offices and post-roads; to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the supreme courts; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies (but no appropriation of money to that use shall be for a longer term than two years); to provide and maintain a navy; to make rules

for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming and disciplining the militia, &c. &c. I pursue no further the enumeration of what is granted or forbidden to the Congress; but, turn next to what the constitution has determined concerning the President, Art. II. sections 2 and 3.—The President shall be commander in chief of the army and navy of the United States and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present shall concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointment are not herein otherwise provided for, and which shall be established by law; but, the Congress may by law vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient: he may on extraordinary occasions convene both Houses, or either of them; and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper: he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Such are the respective boundaries of the power of the Congress and of the President of the United States; and I hope to be pardoned for having taken so much pains to place beyond controversy what, at first sight, may appear, incontrovertible, that the President is no sovereign, and that every prerogative of sovereignty is lodged in the Congress. But, the prerogative of waging war with foreign nations is one of the highest and most important of sovereign prerogatives; and, if the President have no such prerogatives (and with the three exceptions of those of occasionally convening and adjourning the Congress at his pleasure, and of pardon under certain restrictions, he has none) the question cannot remain, whether he have the prerogative of waging war: if he have not the prerogative of waging war, then, the United States being at peace with the catholic king, he could in no wise afford authority to the expedition of Miranda; and, consequently, what Sulpicius represents as the sole defence of messieurs Ogden and Smith, is lost.

But, Sulpicius is not startled at these difficulties. He believes himself able to maintain, First, That the United States, at the time of the commission of the acts charged upon the defendants, were at war with the catholic king; and, Secondly, that the President actually has a constitutional prerogative, in virtue of which he was able to have given (and according to him, did give) authority to Miranda and his friends. I shall dispose, with what speed I may, of the President's pretended prerogative.

*The constitution, it is true*, says Sulpicius, *gives to Congress* exclusively, *the right of* declaring *war;* and, again, *The power of* declaring *war was prudently reserved for Congress;* but, laying an unaccountable emphasis on the *decla-*

*ration* of war, he still contends for the prerogative of the President to commence hostilities, without the authority of the Congress! But, Sulpicius has another resource. Regardless, for a moment, of the letter of the Constitution, he enumerates the functions of the President, and then endeavours to establish by inference the prerogative. *For what purpose*, he asks, *is he placed on this constitutional eminence? Is it that he may stare at approaching danger, and prepare passively to receive the blow aimed at his country?* The Constitution shall answer these questions for itself. He is placed on this constitutional eminence, that he may be able, *from time to time*, to give to the Congress INFORMATION *of the state of the Union, and* RECOMMEND *to* THEIR *consideration such measures as he shall judge necessary and expedient;* and, not *that he may* only *stare at approaching danger, and prepare passively to receive the blow aimed at his country;* nor, let us add, to fit out foreign expeditions at his pleasure; but, that *he may, on extraordinary occasions, convene both houses, or either of them;* and, what is something further, that he may be able to do, what he is commanded to do, TAKE CARE *that the laws be faithfully executed.*

In the paragraph before me, Sulpicius takes several inaccurate views, and is guilty of much misrepresentation. He totally misconceives the office of a commander in chief of the army and navy, of whom he speaks as of the *commander in chief of the nation.* A military commander tn chief is necessarily an officer purely ministerial. Either he must obey the sovereign, or he is the sovereign himself. He is the commander in chief *of the forces;* but he is only to lead and employ them as he is ordered. Is the sword, says Sulpicius, to remain in its scabbard, when an invading foe is at the gates of your citadel? I answer, that it is his duty to defend the gates of the citadel; but no more, till he be further commanded. Every soldier is to maintain his post.

But, what have the expressions, *acting on the defensive, repelling the attack of an hostile nation,* and *an invading foe at the gates of your citadel;* what have these expressions to do with the expedition against the Caraccas? The answer must depend upon the issue of two very extraordinary arguments, in which I am involved by Sulpicius. I am called upon to show, that there is some distinction between *resistance* and *attack, defence* and *offence;* and that the constitution has not given to the President the prerogative of *making* war, while it has reserved to Congress that of *declaring* it!

I ask, whether, if it were known that the king of Spain had sent a force against New York, the President would be justified, on that account, in sending, at his own discretion, an expedition against the Philippines? Sulpicius answers, Yes! and, of course, because it is known that the king of Spain has authorized certain offensive acts in Louisiana, the President was free to send an expedition against the Caraccas! This is what Sulpicius calls, acting on the defensive, repelling the attack of an hostile nation, and stemming an invading foe, at the gates of your citadel! This is self-preservation; this is resisting hostility; this is what Sulpicius denominates, in a phrase as new as his doctrine, *active resistance!* But this doctrine of active resistance calls for very serious notice; I shall presently show, that that of non-resistance is not more alarming.

For my own part, the President *being permitted and required to act defensively,* and the prerogative of declaring war being in the Congress, I am of opinion, that on discovering a hostile project against New York, his duty would be fulfilled in providing, as far as means were in his hands, for the actual defence of that city and of the neighbouring coast, and that he would be bound to wait for the attack; that, further, it would be his duty, on so *extraordinary an occasion, to convene the Congress;* to give to that body *information of the state of the Union;* and to *recommend to* THEIR *consideration such measures as he should* JUDGE *expedient:* but, by *active resistance,* Sulpicius, as we have seen, means something very different from all this. The President is not only to *prepare to*

*meet, but by active resistance to repel and discomfit them;* that is, taking the sovereignty of the country into his hands, he is to employ the public means in whatever way his wisdom may see fit! In this place, Sulpicius talks of prudence and good sense; but, I talk of the American constitution.

Sulpicius allows that what he here teaches is but a construction of the constitution; but, a construction which he believes was put by the present administration, with respect to the measures they have taken as to the Barbary powers. I cannot conveniently avail myself of authentic information upon this subject; but I may safely assert, that if the present administration have acted upon this construction, only three alternatives remain to the Congress; to impeach and punish the persons guilty; to pass a bill of indemnity; or to acknowledge their abdication of their sovereignty, their contempt of the constitution and their treachery to the people.

On what construction, therefore, of the constitution, the present administration has acted, I do not presume to decide; but of what construction it theoretically adopts, I am lucky enough to have tolerably conclusive evidence. To oppose to Sulpicius, I have nothing less than the distinct authority of the head of that administration himself, expressed in his Confidential Message, of the 6th of December, 1805:—'Considering that *Congress alone is constitutionally invested with the power of changing our condition from peace to war*, I have thought it *my duty to await their authority for using force*, IN ANY DEGREE WHICH COULD BE AVOIDED. I have barely instructed the officers, stationed in the neighbourhood of the aggressions, to protect our citizens from violence, and to patrol within the borders actually delivered to us, and not to go out of them, but when necessary to repel an inroad, or to rescue a citizen or his property.'—For *barely*, we must read, *merely*, which is certainly what the the President intended; and, with this emendation, we find him describing a course of conduct precisely constitutional, and such as is a complete definition of that defensive policy with the pursuit of which, and which alone, he is intrusted by the constitution.

But, admitting that both myself and Mr. Jefferson are erroneous in this view of the provisions of the constitution, let us reduce the theory of Sulpicius to practice, and examine the matter under that aspect. *The constitution, it is true, gives to Congress*, exclusively, *the power of* declaring *war*. This Sulpicius allows us. To what end, let him further tell us, did the constitution give this power? and, when it spoke of *declaring* war, what did it mean? Let us suppose the President acting upon Sulpicius's construction of the constitution. He has heard of aggressions on the part of a foreign power, and the danger is imminent. What does he do upon this *extraordinary occasion?** Is it his first business to convene the Congress, and to his second to give that Congress information of the state of the Union, and recommend to *their* consideration such measures as he shall judge necessary or expedient? Does he submit, or does he allow any one else to submit the question, of how these aggressions are to be best received, or whether, justly considered, they be aggressions at all? whether they shall be resented by blows, or deprecated by sacrifices? or, if by blows, by what blows most effectually? Oh, no! he decides all this; he resolves on *active resistance;* he is before hand with the enemy; impatient of attack, he becomes assailant; he equips navies, not to protect the coasts, but to seize colonies; he raises or he marches troops, not to line the shores, not to secure the passes; not to garrison fortresses; not to protect magazines; no, but to embark, to cross seas or mountains; to conquer, to crush, to exterminate; to extend dominion, or to weaken rivals. Well; all this done, the Congress is at length assembled. What follows? The President gives it information of the state of the Union*—and what more?—*Information;* plenty of *information;* information of battles, infor-

* Art. II, sect. 3, ut supra.

mation of conquests, and information of projects. But, what are the measures he recommends to their *consideration*, and of which he only presumes to *judge* that they are necessary or expedient? None; except the declaration of war! His measures are all fixed and in train. He has engaged the country in war; and what remains for the Congress to perform, on this momentous point? why, very rationally, to *declare* upon the fact; to declare to the people and the world, that, after assembling in their hall, and receiving abundant information from the President, in public messages and in confidential messages, they have discovered of a truth, and ventured to declare, that the country—not that it shall or shall not go to war—but, that it is at war; *bonâ fide*, at war! So then, the Congress, instead of composing the sovereign power, is a body which assembles, solely to hear the reports and admire the wisdom of the President, or, if it will, to rail at him! to revile him for what he has done; but not tell him what he shall do, or call him to account for having done more than he was authorized to do at all!

Yes; Sulpicius will dispute this ground. He discovers no absurdity in the reservation of the right to *declare* war to the Congress, while the right of *making* it is abandoned to the President; and the reason of this is the peculiar interpretation which he gives to the *making* of war, an interpretation which I shall have to detect in numerous instances. I believe that I do justice to the sentiments of Sulpicius, when I venture to make this explanation in his name. He thinks that the constitution, in denying to the President the power of *declaring* war, has bound him under this single prohibition, that he shall not be the first to contemplate or commence hostilities; but, that if hostilities be commenced or contemplated by a foreign nation, then he labours under no restraint, but is to adopt what measures he may think proper for counteracting them: this is the latitude which he gives to the defensive system, within the broad limits of which he allows every thing offensive to range itself. How far this interpretation is consistent with the terms and practice of the American constitution I have endeavoured to show; that it is such as was never understood to come within the meaning of *defence*, I will insult no man's understanding by toiling to prove; that, in the President of the United States, it must tend to nothing but rank despotism, I believe that I can soon make evident.

Let us pause, but for a moment, on the consequence of conceding to this officer the prerogative of entering into what Sulpicius calls active resistance. In giving or yielding to any individual the prerogative of sovereignty, of which, as I have said, this is the most sacred, nations have regarded it as an essential part of their policy to surround the throne with a body of counsellors, men whose influence might check the rashness of the monarch, and whose responsible and vulnerable condition was some pledge for the wisdom and the honesty of his conduct. They have wisely made his own person inviolable; but, they have refused obedience to his commands, and deference for his acts, except when given or done *by and with advice;* advice solemnly and formally given. They have made it ascertainable from whom the advice has proceeded; and they have made the adviser responsible for his advice. Now, where are the counsellors, where are the responsible coadjutors of the President of the United States? He has none. But, could the framers of the constitution be thus blind to one of the first safeguards of political liberty? Never! they would have given him counsellors, had they designed him to act the part of a sovereign. No; he has no counsellors, because it is the Congress which is the sovereign; because, for his part, he has only to listen to and obey its orders.* But, if raising upon the basis of the constitution a superstructure

* To their wisdom then I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve. *President's Confidential Message, Dec. 6th*, 1805.

which it was never designed to support, men should now accord to the President sovereign prerogatives; if they should confide in him the care of the nation and the kingly conduct of her helm, what, I say, must follow? Despotism; nothing but despotism; and beyond this—anarchy! Observe the progress:—Allow the President to act upon his own conscience and wisdom, and upon his own responsibility, and is he not, from that moment, your sovereign? Is he not your arbitrary, despotic, uncontrolable sovereign? After acknowledging his prerogative, what constitutional check have you upon him? He was free to act; you have granted this; and therefore you have granted all: for, should you find fault with his actions, as of course you will; should you threaten to depose him, or menace his personal safety, he must appoint guards, and he must levy troops against you; you threaten him with the scaffold, and he enchains you for his protection; you rebel against his government, and he dragoons you into obedience; or, you slay him in the field, or drag him to the block, and make room for a new dictator; or, struggle through blood and guilt and desolation, to a form of government more wise than that which Sulpicius would persuade you that you possess.

No; if you perceive the evil, or are ashamed of the spectacle of a chief magistrate placed in the situation of the President of the United States; if, with Sulpicius, you think that more extensive powers ought to be conferred, take a better course! Make him at once your sovereign; strip the Congress of its prerogatives, and give them to him. Declare his person sacred, for it will be essential to your liberty; but, make his counsellors and ministers responsible, for that is essential to your liberty also. Be careful not to abandon yourselves to a government where no responsibility is required, or, what is the same, where none can be obtained. Responsible ministers may be at least displaced; but a responsible sovereign must defend himself with the sword. You cannot expect him to put off his sovereignty whenever a faction shall please to command it; whenever a populace calls for his head, or whenever boys break his windows. With you, the sovereignty is in the Congress; with you therefore it is so far as it ought to be, that it is not responsible; the President, who is merely a minister, who is not to command but to obey; the President is responsible. Once more, never let him be both sovereign and responsible; it is mockery; it is destruction.

Have I succeeded, then, in affording conviction, that neither in the vocabulary of the language, nor in the letter, nor in the spirit of the constitution, nor in the actual nor plain nor possible construction, nor in the principles of sound polity, any foundation can be had for the prerogative assumed by Sulpicius for the President? This is what I have attempted to do, and what I believe myself to have done: I consequently assume it as true. I leave to Sulpicius, or to whoso will undertake it, to reconcile the provisions of the constitution with the dictates of prudence and good sense. I leave to them the wisdom of giving to a body of men the sovereignty; I leave to them the wisdom of reposing the dearest interests of the nation upon the collected shoulders of numerous individuals, who for the most part are scattered over the country, and who take the chair of government only during a few months of the year, as the magistrate, in *John Bull*, dispenses justice only two hours in the day; I leave to them the merits of a government inactive in the moment of peril, *until Congress can be called together, by a tardy process of proclamation and summons;* I leave to them the advantages or disadvantages of a Presidency rendered incapable of pursuing that magnificent policy which provides for danger before it approaches, which *repels and discomfits an enemy* before he enters the field: this is not my affair; but, I adopt, as the soundest constitutional doctrine, what Sulpicius treats as absurd suppositions, that the President *must lie by*, not only till what he calls (or properly means by) a *formal declaration of war* be made by the hostile

power, but, if need be, still longer; that is, till the Congress shall have returned the declaration; and, expressly I declare, that under the American constitution, he assuredly *must wait until the foe has landed on your shores, or crossed your boundaries, and war is proclaimed at the sound of the trumpet;* that is, he must wait thus, unless Congress have previously declared war. I know very well, that concerning this expression, *declaration of war*, a new impediment presents itself, to a right understanding between me and Sulpicius; but, of this I shall have so much to say hereafter, that I chuse to be silent here. I must however add, that this restraint under which the President acts, by no means reduces him to the necessity of seeing with inactivity the *territory invaded by a hostile power*. This is one of the misrepresentations of Sulpicius. If the territory be invaded, he is to meet the invader; but he is not to go to the Caraccas in search of him!

If I needed to look around me for multiplied proofs of the utter incongruity of the opinion of Sulpicius, with the letter, theory and practice of the constitution of the United States, I might find one in the very term, *executive*, so offensive to the ear of a foreigner acquainted with the English language, but which is decidedly expressive of the nature of the offices to which it is applied. Of late years, the contagion of speech has led many persons in the English parliament to apply this term, with sufficient stupidity, or a tainted affectation of democracy, to the crown and its ministers; but these do not form *the executive department* of the state, because they do not form merely that; they have higher functions; they are *the government*. On the other hand, in America, it is the Congress which is *the government;* and the department, filled by the President and the other public servants, is strictly the *executive* department. But, must I repeat, that what is merely executive, is not sovereign; or, must I begin my whole story again, and say, that to wage war is the highest prerogative of sovereignty; or, that to be foremost in hostilities, or to engage in foreign hostile expeditions is, under whatever circumstances, to wage war?

One word more, and I shall then leave this branch of the argument. Sulpicius has mentioned the dispute, to this hour maintained, as to the aggressor, or first mover of offensive war, between Great Britain and France, in the last war. Now, the possible recurrence of this doubt, on similar occasions, is one of the strongest reasons for holding a tight rein over the President of the United States, as to such conduct as may lead the nation into war. It is essential that that power in the state which is sovereign should have the exclusive prerogative of judging for itself, as to when aggressions have really been sustained, and when and in what manner it will resent them. It must not be betrayed into war by the zeal of its servants. Nor can any thing be more weighty nor more clear than a second subject for consideration; the prudence of withholding from such servants the prerogative of entering upon offensive enterprizes, though there be imposed on them the duty of performing what is strictly defensive. Not only were the party with this prerogative a party with sovereignty; not only might it embroil the nation in war against the will, and even without the knowledge of the sovereign; but, all this apart, the policy of foreign expeditions, of what military men call diversions, and of what ambitious men call acquisitions, is commonly questionable, and always entitled to discussion; but, the policy of home defence, of a levy *pro aris et focis*, never.* This principle therefore erected into a rule of conduct, the sovereign members of the Congress may disperse themselves over the continent, as a merchant may leave his counting-house, satisfied that

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* The sense of the committee was, neither to make war, nor to purchase peace; but to provide for the defence of our actual territory. On this point they conceived there could be but one sentiment, whatever difference of opinion might exist as to the wisdom of pledging the nation to protect its flag in remote seas, or its ability to afford such protection.

*Decius.*

those who act under them will pursue the ordinary and indispensible routine of business, and equally satisfied that they will undertake no adventures. For the officers of government to watch over the actual territory of the state, and to defend it if attacked, is no more than for a clerk to receive the debts due to his master, to take care that his paper be honoured, and to lock his door against thieves; but, if the former, availing themselves of the resources in their hands, launch into questionable acts, it is the same as if the latter, lured by some dazzling speculation, undertook to trade for their master, by putting out his property, and thus afforded him the chance of returning to empty coffers and a ruined credit. In all matters of speculation, it is the sovereign that must rule; and the President is not the sovereign.

Away then, with the President's pretended prerogative! away with all pretensions founded on its existence! Let us now see what will become of Sulpicius's second topic of defence, that *war virtually and de facto existed* between Spain and the United States; or, that *we have been actually at war with Spain, and were so, when the Leander was fitted out at New York.*

If any perfection of the reasoning faculty could preserve a man from drawing false conclusions from false premises, I know not within what bounds I should be able to restrain my language, when I attempt a reply, arduous as the task necessarily must be, to assertions so preposterous. The country was at war! but the constitution says, that Congress has the exclusive power of declaring war; and where is the declaration of Congress? The country was at war! but the President told general Miranda that the country was not at war; that it *was not prepared to go to war.* The country was at war! but consuls and diplomatic ministers reciprocally resided in it, and in that of the enemy. The country was at war! but commercial intercourse subsisted in its accustomed state; the ports were not shut against the enemy, nor were the ports of the enemy shut.

I have already availed myself of the very important public letter of Decius, in the good faith of which I, with Sulpicius, put reliance. But to this letter Sulpicius refers me, for proof positive that at the time the Leander was fitted out at New York we were actually at war with Spain, and that the President acted under that impression. If the President's word is to be taken, I have already shown, on his authority, that he did not act under that impression; but, let us look into this letter, for further proof that the country was at war!

The country was at war! What then was the object of the President's Confidential Message? To put the Congress in possession of this important secret? No; but to submit to its deliberations the state of the Union with regard to Spain, and to enable it to determine whether the country should be at war or not! Did the President say the country was already at war? So far from it, that even with respect to the time present and the future, he was of opinion, that at the *crisis* in which he wrote, a settlement of the differences between this country and Spain might be obtained, simply by assuming a manly attitude. FORMAL WAR IS NOT NECESSARY; *it is* NOT PROBABLE THAT IT WILL FOLLOW; *but the protection of our citizens, the spirit and honour of our country require that force* should be *interposed in a certain degree. It will probably contribute to advance the object of peace;* that is, to maintain peace.

Thus far the President, and the impressions under which he acted; but, under what impressions did the congress act? Did it open its eyes to the war in which the country was engaged, and proceed to what alone was left it, a discussion on the means of carrying it on, or of bringing it to a conclusion? No; the Congress, dull to all which is so clear to Sulpicius, stupidly formed a committee—to inquire whether it would be proper to go to war or not! After the patient's leg was off, as Sulpicius says it was, they were to decide, whether the amputation should take place! But this might be a misapprehension of the mere mob of Congress; let us look to the proceedings of the committee. Did the committee dive into the truth? Was the committee aware that the country was at war? Not a whit! *The committee saw, in the multiplied aggressions of Spain, ample* CAUSE *of war, on the part of a government with which the welfare of its citizens was not paramount to every other consideration; but conceiving that the true interest of the American people (which alone it behoved them to consult) required peace, they forbore to recommend offensive measures. The sense of the committee was, neither* TO MAKE WAR, *nor purchase peace,* but to provide for *the* DEFENCE OF OUR ACTUAL TERRITORY, *which the highest authority had announced to have been violated; and to be menaced with fresh invasion.** So then, the committee, not only did not regard the country as at war, but did not think it proper that it should go to war; and this committee imagined that there is some line of distinction between *providing for the defence of our actual territory* and *making war.* It thought it possi-

* Decius.

ble to do the one, and at the same time leave the other undone! Perverse committee!

From the letter of Decius then, I learn, upon fresh evidence, that at the time the Leander was fitted out at New York, neither the Congress, nor the committee of the Congress, regarded the country as at war! But, all these might be mistaken. I learn then, further, that the country could not be at war, because at that very time it was deliberating upon the question of peace or war! If there be a shade of difference between any two things upon this earth, there must be something of the kind between the state of war, and that state in which it is matter of choice whether to be at war or not.—And this is the letter to which Sulpicius refers me, for proof that the country was at war!

There were no end to the ridicule which the maintenance of such an opinion excites; but I prefer the more gracious task of discovering to my adversary his error. Let others giggle at Torquatus as he passes; I will take him by the hand, and tell him that his wig is hind-part-before. To what then are we to attribute it, that a writer, like Sulpicius, can be found in so extraordinary a situation? To this alone, that he entirely forgets the meaning of the word *war*, as well as it stands in the vocabulary, as in its political acceptation. When the Scotchman described the nightingale with all the characteristics of the owl, it was not because his mind was deranged, or his ear false, or his eye disordered; but because he mistook the bird. In like manner, Sulpicius mistakes *war;* and, after this, all the rest is rational. When a schoolmaster flogs a scholar, or a negro-driver a slave, does Sulpicius say there is a battle? To constitute a battle, there must be an interchange of blows; to constitute war, reciprocal hostilities. A state of suffering is not the same thing with a state of war. Can a nation be in a state of war unless it be in a state of violence? and can it be in a state of violence, when it is in a state of submission or of quiet; when it is merely contemplating the injuries it receives, and revolving in its mind the course it shall pursue? War is an active, not a passive condition. It is always in our choice; it cannot be forced upon us; no conduct of a foreign nation can place us in a state of war against our will. Napoleon forces no nation to go to war with him; he marches into its territory, and seats himself in its capital; but he reproaches it with the waste of human blood, when, on these accounts, it ceases to be at peace. A man may be forced to receive a drubbing; but he cannot be forced to fight: to receive the stroke is one thing; to strike again is another; but, Sulpicius gives to both the same denomination. According to him, a nation may at once be impassible and at war!

No conduct of a foreign nation can place us in the state of war, against our will. Suppose that instead of the still doubtful hostility of Spain, (though perhaps not doubtful aggressions,) the most unequivocal facts were before the world. Suppose that to-morrow we receive intelligence of a declaration of war on the part of the court of Madrid, and of the issue of letters of marque and reprisal against our commerce. What then? Is this country necessarily at war with Spain? Assuredly not; it is still free to maintain its peace; it may still refrain from hostilities; if submissions be required, it may make them; if tribute or contribution is wanted, it may give it; if territory be demanded, it may cede it; if a foreign yoke is to be fastened, it may bow the neck. It cannot be forced into war. At this juncture, not a post arrives, but might afford me examples of what I describe, in the passing events of Europe.

Sulpicius looks at the Spanish aggressions, and finds in them war; the committee, more correctly, looks at those aggressions, and finds—*ample cause of war*. This, in truth, is all that Sulpicius sees, and all that he mistakes for *war*. But, if foreign aggression could place this country in a state of war, with what nation is it at peace? If Spain aggress in Louisiana, does France never aggress in the West Indies? and, of the aggressions of Great Britain, we hear not less than of those of Spain. America, therefore, is at war alike with Spain, France, and Great Britain; or, she is at war with neither. If Sulpicius be right, Mr. Jefferson's administration has been one of the most warlike upon record!

But, to show still further with what certainty we may pronounce on the error of Sulpicius, let us look at its frightful operation in practice; its total national disorganization; for it is not one of the least singular circumstances in the letter of Sulpicius, that he is alternately the advocate of principles which establish despotic government, and of those which take from the government all control over the people; so unsettled is his theory of polity, or so little does he apply that theory, in the present momentous inquiry. The act of the Congress, under which messieurs Smith and Ogden were indicted, renders it a crime to begin, set on foot, or provide or prepare the means for any military expedition or enterprize, to be carried on from the United States, against the territory or dominions of any foreign prince or state, *with whom the United States are at peace*. In consequence, to make such an expedition or enterprize criminal, there is but this sole requisite, that it be against a foreign prince or state, *with whom the United States are at peace;* but, according to Sulpicius, whenever there be cause of war (which is always matter of opinion) whenever there be aggressions (real or supposed, and always susceptible of explanation, accommodation, &c.) whenever there be cause of war, malgre the exclusive prerogative of the Con-

gress, the whole nation, one and all, President* and populace,† are free to go to war! But, the exercise of this freedom, in the President, is despotism, and in the people, anarchy.

To what end is government established, but to act for the whole nation, according to its clearest perceptions and honest intentions, for the common good? and by what means can it effect this object, but by the people's faithful and entire concurrence in its views, and at least passive obedience to its decisions? but by its exercise of efficient control over all those transactions of individuals in which the state is interested?—But, Sulpicius presents us with the monstrous picture of a government deliberating on the course it shall pursue, and a handful of citizens resolved; of a government willing perhaps to make sacrifices, or proposing perhaps to gain time, and of two or three individuals who take the business into their hands, will part with nothing, and precipitate every thing; of a government possibly determined to preserve peace, and of John, Dick and Harry determined to go to war! —I pay my money and give my support to government, and to government I look for the conduct of the nation; on its wisdom I rely for the maintenance of peace, on its vigour for the prosecution of war; I study its temper; I gather its reports; I hear its decisions; and I freight my vessels accordingly; I calculate on my own security; I contemplate the prosperity of my country: but, no; I am deceived; I have followed an *ignis fatuus:* I have mistaken the lighthouse; the government is not where I supposed; my next door neighbour, or some planter, or some pedlar, in the remotest corner of the empire, decides on peace and war; what I have called the government would have had it one way, but he has had it the other! Good God! in what a situation does Sulpicius place the Congress of these states! It is to that body that the people look for the management of their affairs; it is their reputation, their feelings, their lives perhaps that are at stake; but to-day the President, and to-morrow Smith and Ogden, and the next day some labourer on the wharfs or on the highway, will plunge the country into war, prepared or unprepared, willing or unwilling!

Look closely at the case before us. Sulpicius and Smith and Ogden *regard our situation in relation to Spain as an hostile one*, and think it *good policy to divert the hostile intentions* of the latter *by encouraging this attack on her colonies.* They would have *applauded the President had he gone much farther than he did;* and they are ready for *the last means of vengeance.* Now, what are the coexistent sentiments of the committee of Congress, and of the Congress itself?—*The committee saw in the aggressions of Spain ample cause for war;* so far they agree with Sulpicius, Ogden and Smith; but their politics soon differ widely: they saw *cause of war,* provided they had had to conduct the affairs of state upon any principle except that of regarding the welfare of its citizens as paramount to every other consideration. So then, though they thought there was *ample cause of war,* they did not think war consistent with the welfare of the citizens! This is certainly a point of some importance, and one on which it appears they thought differently from Sulpicius, Ogden and Smith. Their conduct is strictly conformable: Conceiving *that the true interest of the American people* (*which alone it behoved them to consult*) *required peace, they forbore* TO RECOMMEND OFFENSIVE MEASURES!!! THEY *believed it to be our policy to reap the neutral harvest!—The sense* OF THE COMMITTEE *was,* not *to make war, but* solely *to provide for the defence of our actual territory.—On this point* THEY *conceived there could be but one sentiment, whatever difference of opinion might exist as to the wisdom of pledging the nation to protect its flag in remote seas, or its ability to afford such protection.** If we look to the Congress itself, so far from opposing this sentiment of its committee, we find it voting money, for the purpose, not of commencing or carrying on a war, but of accommodating differences!

Far be it from me to decide, when doctors disagree! I do not pretend to determine what is and what is not the *true interest of the Ameri-*

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* It is the duty of the President *whenever* he has grounds to believe that hostile preparations are making by a foreign power, not only to prepare to meet, but by *active* resistance to repel and discomfit them.—Actual hostilities were committed by the Spaniards, on our frontiers, not proceeding from the intemperance of the commander of a company, or the governor of a province, but with the knowledge and under the direction of the Spanish government. We *all regarded* our situation in relation to Spain as a hostile one. Such was the opinion dictated by the common sense of this nation, on a view of the passing conduct of the officers and subjects of that. That such was the *opinion* of the President too, manifestly appears in his official communication to Congress at the opening of the session, and, *under the influence of this opinion,* it was his duty to wound the adversary and to weaken him! Is he then to be blamed for favouring the enterprize of Miranda? Was it not good policy, was it not his duty, to divert the hostile intentions of Spain, by encouraging this attack on her colonies? *Sulpicius.*

† And the defendants were consequently not guilty of any offence under the act of Congress! They come within the proviso expressed by Mr. Jefferson himself in his conversation with Miranda, "they have not infringed any law of the United States." *Sulpicius.*

* Decius.

*can people;* but, I cannot avoid remarking how much at variance are the opinions of the two great councils; Sulpicius, Ogden and Smith, and the Congress of the United States! And what avails it, that we call the latter the government, if the former is to fit out expeditions for *the last means of vengeance*, while this resolves to abstain from all *offensive measures?* And how agreeable must have been the meeting of the President and Congress, had he diverted the intentions of Spain, by encouraging an attack on her colonies, and then found the policy of the Congress to be that of entering into no *offensive measures?* And what, after all, is the situation of Congress, with the peace of the country already compromised, with its policy already perhaps frustrated, by this diversion?

For, let no man presume to say, that he can calculate on the issue of what relates to America in the expedition of Miranda; much depends upon Miranda's success; but more on the will and power of France. If Miranda perish or be repulsed, the insignificance of the consequences may prevent particular notice of the enormous aggression committed in this affair, by America on Spain;—men think of effects more than of principles; but, if a small or a great revolution should result; if France should choose to resent this aggression, for what has she not been afforded the pretext? She tells the people of Switzerland, that if their landammann will wink at the introduction of British manufactures, and if France choose to regard this as an act of direct hostility, they can have nothing to call injustice in her conduct, if she should spread her armies from one limit of their mountains to the other, and make a conquest of the whole. Let me be answered, with how much increase of force may she not one day apply this reasoning to America? Nor is the argument a false one; for, except with certain politicians, the act of the government is held to be the act of the subject; and the act of the subject, being one controlable by the government, to be the act of the government itself. The act of Miranda and his associates, with respect to America is precisely of the same nature with what is pretended to be that of general Brady, with respect to Austria; and, for the offence of Brady, Austria is denied Brannau and all the strength of her western frontier!

The essential policy then, of confining to the government the sole authority for offensive operations, I assume as granted. It is a policy for which I may refer, and I refer with peculiar pleasure, to the example of the Shawanoes. On a late occasion, they have informed an American governor, that finding the peace of the nation compromised by the acts of straggling parties, they have resolved on assembling all those parties into one band, for the better control of their conduct. But, to this policy, so obvious, that I grow weary while I write on it, and fear to be thought idle in asserting; to this policy Sulpicius is in direct opposition.

It is in direct opposition to this policy, that he contends for the utility of the President's message, in behalf of messieurs Ogden and Smith. It is in direct opposition to this policy that more than half his language, and all his principles are conceived. He tells us that *we all regarded our situation in relation to Spain as an hostile one;* he talks of *opinions* of the nation and of the President; and of those *opinions* as making it a duty to wound the adversary; he puts into the hands of the people and the President, and into any but those of the government, the *policy** of peace and war!

With respect to the message, Sulpicius proceeds upon a principle, which if received, must eradicate this policy, root and branch; that is, must remove at once all the ligatures by which men are formed into a nation; must put an end to every form of government (even that of the Shawanoes); must scatter us as unconnected individuals, and take from us all title to a national name. It is an acknowledged inconvenience of a free government (however counterbalanced) that the information, and the views, and the projects of the rulers must, for the most part, be made matters of public notoriety: hence, the national arm is weakened at home, and the enemy prepared for the blow. But, what are these evils to those which must follow, if it be conceded that individuals are as free to enter into political measures as the government itself? If it shall be conceded that, after establishing, by the acts of government, the state of the nation, they are free to do whatever their sentiments of that state may dictate? If Ogden and Smith, after showing, on the authority of the President, that the nation was aggrieved, shall be held free to undertake its cause? What is all this, but frightful? What is all this, but complete disorganization?

But, Sulpicius is still of opinion, that *we have been actually at war;* and he does well to stickle for this point, though he do not appear to be aware of what I may call, its all-importance. I shall give him one further answer, and no more. The neglect, in the modern practice of states, of *declarations of war*, constitutes one of the windings of that labrynth

* It is thus that Sulpicius incessantly confounds things. In the same sentence, and as one question, he asks, Was it not *good policy*, was it not his *duty*, to divert the hostile intentions of Spain, by encouraging this attack on her colonies?—Nothing can be more distinct than the questions on what might be *good policy* in the state, and what is the *duty* of the President. What is *his* duty, the President is to do; what is *good policy*, it is for the Congress to decide, and for the latter *with sincere zeal, to pursue.*

in which Sulpicius is lost. Because all wars have not been preceded by *declarations*, he is very rightly of opinion, that states may be at war, though no declaration be made; but he founds, on this proposition, others as false as this true. He infers, that it was in the want of a *declaration* only that the situation of America resembled that of peace, and he says, that war has often subsisted without such declaration. He infers, that to issue such declaration is to become the original aggressor, and he says, that it is in default of such declaration, that we dispute on the propriety of applying this term to France or to Great Britain; he infers that to issue such declaration is to become the *original aggressor*, and he says, that this is the sole power exclusively given to the Congress! This at least, is all I am able to understand by the language of Sulpicius; for he lays much stress on the precise word, *declare*, and he allows the President to aggress, after aggression received.

But, to *declare war* is to *make war*, and to make war is, indifferently, to begin, or to return offensive operations; and this is the sovereign prerogative vested exclusively in Congress. War may be declared by actions, not less than by words. Publicists even expressly speak of things *tantamount to a declaration of war;* and every state is allowed to regard as an *aggression*, as a declaration, or as what is tantamount to a declaration. In general, the issuing of letters of marque and reprisal is the signal, and is regarded as a signal or a declaration; and a sufficient declaration it certainly is. Now the issuing of letters of marque and reprisal is distincly reserved to Congress, and consequently all acts of hostility, and *a fortiori* all the more violent aggressions; but, if aggressions and acts of hostility be declarations of war, then they are forbidden to the President.

Thus then I am entitled to assume, that the country was not, as Sulpicius says it was, at war with Spain at the time of the fitting out of the Leander; and that it was not, as Sulpicius says it was, the duty, nor even an allowable act of the President to favour Miranda's enterprize. It follows, that the defendants could be entitled to no benefit from the defence which Sulpicius represents as their sole defence, but which is founded on falsehood, in all its parts; it is false as it contradicts the fact required by the statute;* and false as it depends on the constitution.

But, I have already promised Sulpicius a very singular concession; and I shall make him more than one. Either the President has the prerogative contended for, or he has not; either the country was at peace with Spain, or it was not.

Now, if the President have not the prerogative, then his participation could be nothing but guilt; and his guilt cannot constitute the innocence of Messieurs Ogden and Smith: then, therefore, so much of the defence is at end.

But, if the President have the prerogative, then it is incumbent on him to exercise it with some formality; then all persons acting upon it, must provide themselves with such warrants, under his hand, or under that of some other duly authorized responsible person, that so, when called upon to answer the laws, they may be able to establish the innocence they derive from this participation. It cannot be suffered for a moment to end in a vague and hear-say story of the President's commands or wishes: they must show his warrants; and, what is more, we must be able to discover in the statute-books the forms of warrants or other satisfactory papers as may have been prescribed by the Legislature. It cannot be suffered for a moment, that while a constable is to be asked for the warrant under which he subjects a citizen to the most trifling restraint or coercion, an individual is to do that which may injure and even ruin a people, upon pretended and unproved and irregularly exercised authority. For a constable to say, that he has the consent of the magistrate, will never avail him. In a word, if this prerogative be known to the constitution, then it is known to the legislature; and if it be known there, let me be shown the forms under which it is ordered to be exercised, and let me be shown that those forms have been complied with. The President's prerogative is therefore, even upon this ground, wholly out of the question.

But, either the country was at peace, or it was not. If the country were at peace, then it is admitted that the President's participation could not be lawful. But, what if I show, that if the country were at war, then his participation is not necessary, and therefore need not be mentioned? What if I further show, that if it were at war, his participation would be as unlawful as if it were at peace?

If it be said that the country was at war with Spain, then the act of Messieurs Ogden

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* If any person shall within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprize to be carried on from thence against the territory or dominions of any foreign prince or state *with whom the United States are at peace*, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years. *Act of June 5*, 1794. Vol. III, p. 88, Sect. V.

and Smith is not the act described by the statute; the expedition was not *against any foreign prince or state with whom the United States are at peace*. In consequence, they could have needed from the President no protection against the laws.

If it be said that the country was at war, then the President's power, with respect to an offensive operation like that of Miranda's, was neither more nor less than if it were at peace.

Still the same error with Sulpicius! Still the President is his sovereign!—But, what would Mr. Jefferson, or what would any constitutional President of the United States have done, had Miranda opened his project during a war with Spain? Wherefore did Miranda open his project to Mr. Jefferson? To gain his personal approbation? no; but to gain governmental assistance. Now, when asked for this assistance, what would a President of the United States have done?—Would he on his own authority have employed the resources of the nation in an expedition against the Caraccas? Assuredly not; had Congress not been sitting, and had he deemed the proposal sufficiently important to the country, he would even have convened that sovereign body for the occasion; but, under all circumstances, to that and to that alone, he would have submitted the policy of entering into the scheme of Miranda; and from that, and that alone, could Miranda and his associates have derived any national assistance. Without the Congress, being at war, they might have obtained letters of marque and reprisal; but, beyond these, nothing.—To issue letters of marque and reprisal is the exclusive prerogative of the Congress; and is it to be believed that the President, who may not do this, may do much more?

It must now be evident (what I chose to demonstrate before I assumed,) that all which is said by Sulpicius of the President, however important as a constitutional question, is entirely disconnected with the defence of Messieurs Ogden and Smith. If he have the prerogative, there must be some legal forms for its exercise, and those forms must be complied with; if he have it in war, he must have it equally in peace, and the truth is that he has it neither in the one nor in the other; his participation could be nothing but guilt; his approbation, nothing at all; and, hence, *The conduct of the public servants, whatever it might have been, could afford no answer to the indictment preferred against either colonel Smith or Mr. Ogden.*

The single question therefore is, were the United States at war *with Spain, when the Leander was fitted out at New York?* Sulpicius himself asks the question: *Were the United States at peace with Spain?* and he answers it, as he believes, by asking a second: *Had* she *not committed hostilities upon* us? But, that *she* had committed hostilities upon *us*, is no proof that *we* were not at peace with *her*. To be at war with her, *we* must have committed, be committing, or determined to commit hostilities against *her*.

This however, Sulpicius represents as the defence of the defendants, to which he adds, that they had *no other defence*. If this be so, messieurs Ogden and Smith have been wrongly acquitted; but, this is a trifling evil, when compared with the ruinous principles upon which it was done, or which are raised upon its foundation. I reiterate with entire satisfaction, whatever I may have said in my former letter.

Yet, under this head, in one point, I have to correct myself. I have judged too favourably of the public servants. I had thought them guilty only of neglect, where vigilance would have become them. I despised their meanness, and I detested men, who placed as the advance-guard of the nation, had failed to give alarm when danger was to be apprehended; but, in referring to the act of the Congress on which messieurs Smith and Ogden were indicted, I find their guilt infinitely greater than I supposed. It is expressly provided, in that act, that the President shall have power to seize, or cause to be seized, any vessel fitted out under the circumstances in which the Leander was fitted:* it was therefore a high misdemeanor not to do so. According to

* In every case in which a vessel shall be fitted out and armed, or attempted to be so fitted out or armed, or in which the force of any vessel of war, cruiser, or other armed vessel shall be encreased or augmented, or *in which any military expedition or enterprize shall be begun or set on foot contrary to the provisions and prohibitions of this act;* and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as above defined, and in every case in which any process, issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state: *In every such case it shall and may be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary* for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes, in the cases in which restoration shall have been adjudged, and also *for the purpose of preventing the carrying on of any such expedition or enterprize from the territories of the United States against the territories or dominions of a foreign prince or state with whom the United States are at peace.*

some facts which have been disclosed, they have likewise offended against the provisions contained in the very section on which messieurs Smith and Ogden were indicted; if the story of the ordnance be true, it may yet be possible to prove, that they had some share in PROVIDING *or* PREPARING *the means for a military expedition or enterprize, to be carried on from the United States against the territory or dominions of a foreign prince or state with whom the United States* are and *were at peace.* These are grounds, therefore, for two articles of impeachment. The one cannot but be sustained, whatever may become of the other. The Congress will not, cannot, but by that baseness *which more than half meets slavery*, neglect them. Every member of the House of Representatives will support them; and the Senate, in trying the accused, will be careful to avoid that path of besotted ignorance, or unqualified infamy, in which it is so cruelly represented that the juries of New York have trod.

CONCANGIUS.

## VARIETY.

Variety is charming,
Constancy is not for me;
So, ladies, you have warning.

OLD BALLAD.

DIBDIN, who is so much at home as a song writer *on deck*, is not less easy on shore. The following ballad is very easy and sprightly, and the week's journal of a giddy girl will divert our readers.

Lectur'd by Pa and Ma o'er night,
Monday at ten, quite vex'd and jealous,
Resolv'd in future to be right,
And never listen to the fellows,
Stitch'd half a wristband, read the text,
Receiv'd a note from Mrs. Racket:
I hate that woman, she sat next,
All church time, to sweet captain Clackit.

Tuesday got scolded, did not care,
The toast was cold, 'twas past eleven;
I dreamt the captain through the air
On Cupid's wings bore me to Heaven:
Pouted and dined, dressed, looked divine,
Made an excuse, got Ma to back it,
Went to the play, what joy was mine,
Talked loud and laugh'd with captain Clackit.

Wednesday came down, no lark so gay,
The girl 's quite alter'd, said my mother,
Cried Dad, I recollect the day
When, dearee, thou wert such another.
Danced, drew a landscape, skimmed a play,
In the paper read that widow Placket
To Gretna Green had run away,
The forward minx, with captain Clackit.

Thursday fell sick; poor soul she 'll die;
Five doctors came with lengthened faces,
Each felt my pulse; ah me, cried I,
Are these my promis'd loves and graces?
Friday grew worse; cried Ma, in pain,
Our day was fair, heaven do not black it;
Where 's your complaint, love? In my brain.
What shall I give you—captain Clackit.

Early next morn a nostrum came
Worth all their cordials, balms and spices,
A letter, I had been to blame.
The captain's truth brought on a crisis.
Sunday, for fear of more delays,
Of a few clothes I made a packet,
And Monday morn stept in a chaise,
And ran away with captain Clackit.

The ensuing ballad by the same ingenious writer is another proof of the versatility of his powers.

Walk in, walk in, each beau and belle,
Here wisdom, virtue, truth, we sell,
Nay, think not I a falsehood tell,
I deal not, sir, in raillery.
I deal in wigs, a curious ware,
In which grey, red, black, brown and fair
May suit their features to a hair,
In this our gay wig gallery.
The wig 's the thing, the wig, the wig,
When pertly parsons claim their pig,
Or guttling alderman look big,
I do not say they are not wise,
I only say, in vulgar eyes,
The wisdom 's in the wig.

See in this jazey what a twirl,
'Twill suit a young or ancient girl,
Sly Cupids lurk in every curl,
The ribband Venus zone is;
Rouse then, old man, throw by your staff,
Regard not how your neighbours laugh,
When but a guinea and a half
Can make you an Adonis.
The wig 's the thing, the wig, the wig,
Be of the ton a natty sprig,
The thing, the tippy and the twig,
Nor heed who are the truly wise,
For after all, in vulgar eyes,
The wisdom 's in the wig.

Cries Verjuice, pointing at the play,
Is that your wife, intriguing, pray?
Oh no, my lovey's hair is grey,
That woman's hair is flaxen.
Then say, who would not be a wife,
To lead an unsuspected life,
And cure all foul and jealous strife,
By wearing of a caxon?
The wig's the thing, the wig, the wig,
Then hey for fun and rig and gig.
Who for dull moral cares a fig?
'Tis useless to be truly wise,
For after all, in vulgar eyes,
The wisdom 's in the wig.

Thus arm'd, you lovers do not spare:
At will a hedge hog, or a bear,
A Freizland hen, a Flanders mare,
  Whate'er you wish well suits us.
The lawyer's flaw shall find a patch,
A bob the knowing head shall thatch,
The henpeck'd husband wear a scratch,
  His wife, a monstrous Brutus.
The wig 's the thing, the wig, the wig,
Who 'd in the mines of learning dig,
Or Heliconian potions swig,
Or study to be truly wise,
When, after all, in vulgar eyes,
The wisdom 's in the wig.

*For the Port Folio.*

[He, who has ever *heard* the cheerful chorus to the following Sea Song, will smile when he reads it here.]

I am a jolly roving tar,
  Fearing neither wound nor scar,
And many a tightish breeze I've seen
  When the grog is giving out,
  At a bottle or a boozing bout,
Tom never was a lubber to give in.
  On shore, my hearts, on board a ship
  Good humour with me keeps a trip.
    'Tis yeo, yeo, drink and kiss the lasses,
    Drink away—that's your play,
    Fal de ral, yeo, yeo,
    Drink away and kiss the lasses.

Fitted out a cruiser tight,
  In a breeze I take delight,
And fighting's my fair weather, I allow;
  Just like new ones at a play,
  We tars have such a taking way,
We always take the enemy in tow,
  Fearing neither fin nor wing,
  At our guns we gaily sing
    Yeo, yeo, &c.

The grog I love you know's my boast
  And was I every heart to toast
That leads Britannia's crew to victory—
  Make the sea grog, their health to quaff,
  Before that I could drink them half,
I'm sartain that the ocean would be dry.
  So here goes what the world appals,
  Old England and her wooden walls.
    Yeo, yeo, &c.

ON A COURTESAN.

*Before enjoyment* lovers cry,
Of Cupid's fiery darts they die;
Yet, once possest, the fair complains
No spark of all the flame remains;
The swain that tries this lovely dame
*After enjoyment*, finds *the flame*.

LINES.

When Fortune seems to smile, 'tis then I fear
Some lurking ill and hidden mischief near;
Us'd to her frowns, I stand upon my guard,
And, arm'd in virtue, keep my soul prepar'd:
Fickle and false to others she may be;
I can complain but of her constancy!

ADMONITION TO THE LADIES.

Myrtilla, rising with the dawn,
Steals roses from the blushing morn,
But when Myrtilla sleeps till ten,
Aurora steals them back again.

TO OUR READERS.

Although the summer solstice is past, yet our readers may exclaim that the Editor by a queer kalendar of his own invention, has contrived that the *longest* DAY in the year should appear on the 6th of *September*. Seriously, the vast importance of the subject, the high interest the public take in the discussion, and the absolute necessity, as well as perfect propriety of sometimes obliging our political friends, have stimulated us to devote almost all our pages to the elaborate essay of CONCANGIUS. He has ably analyzed his subject, and though prolix, he is never tedious. To SULPICIUS and to him we give our plaudits for the dexterity with which they wield the quarter-staff of controversy. The public will award the prize.

Non nostrum est tantas componere lites.

Our lounging and literary friends, who may be terrified by the view, in long perspective, of a vast plain of politics may be consoled by the assurance that next week they shall wander again in the GARDEN of VARIETY.

Of a great number of very valuable papers from our most respectable correspondents, we are obliged to postpone the publication for the present. Let not the authors be impatient. Their literary offspring, like the editor's are equally rocking in the cradle of repose; but, like other tidy children, they shall go abroad, and court public notice, on the first genial day.

The Price of the Port Folio is Six Dollars per annum, to be paid in advance.

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